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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 96-76
Table of Allotments,)	RM-8770
FM Broadcast Stations.)	
(Nekoosa, Wisconsin))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 20, 1996

Released: December 27, 1996

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the Notice of Proposed Rule Making, 11 FCC Rcd 4656 (1996), proposing the allotment of Channel 288A to Nekoosa, Wisconsin.¹ The Notice was issued in response to a petition filed by Lyle Robert Evans d/b/a The Radio Company ("Evans"). Evans and Mark Heller ("Heller") filed comments. Evans filed reply comments.

2. Evans continues to support the allotment of Channel 288A at Nekoosa, as the community's second FM broadcast service. Evans has stated his intention to file an application for a construction permit to activate the channel at Nekoosa, and if granted, will promptly construct the facility.

3. Heller, licensee of Station WTRW-AM, Two Rivers, Wisconsin, filed comments objecting to the allotment of an additional FM channel at Nekoosa. Heller points out that Channel 229A at Nekoosa, for which a construction permit has been approved, remains unbuilt.² Heller also notes that Station WCAE-AM, Nekoosa, for which Evans is the consulting engineering, remains unbuilt. Heller argues that the Commission is too liberal in allowing construction permits to lay dormant, often preventing broadcasters from making improvements to existing, operating stations. Heller believes that the community of Nekoosa would best be served by activation of the existing assignments rather than by the allotment of a new channel.

¹ The 1995 edition of the Rand McNally Commercial Atlas indicates that Nekoosa is incorporated with its own post office and zip code, financial institutions and a population of 2,557 people.

² On September 26, 1996, a minor change "one step" application filed by Berry Radio Company, was approved to modify permit BPH-880519OG to upgrade Station WXEC-FM from Class A to Class C3 on Channel 230C3. The construction permit expires on March 26, 1997.

Heller questions Evans intentions with respect to the Nekoosa allotment, stating that Evans is proposing to locate a tower for Channel 288A at a site which could adversely affect Station WAPL-FM, Appleton, Wisconsin. Heller also points out that numerous construction permits have been granted to Evans or his clients, in Wisconsin and Michigan, which remain unbuilt.

4. In reply comments, Evans contends that Heller makes frivolous allegations and offers facts that have no relation to this proceeding. Evans argues that Heller's concerns over unbuilt Station WCAE(AM), Nekoosa, for which Evans is the consulting engineer, should be directed to the Commission and not filed in this rule making proceeding. According to Evans, Heller has failed to produce any evidence that Evans does not intend to construct the stations for which he has permits. Moreover, Evans points out that allegations of this type have no place in this proceeding. Evans states that he does intend to apply for and construct the new Nekoosa station if the allotment is made.

5. After a review of the information submitted in this proceeding, we believe the public interest would be served by the allotment of Channel 288A to Nekoosa, as that community's second FM broadcast service. Evans has filed an expression of interest, stating his intention to file an application for the channel.³ Channel 288A can be allotted to Nekoosa, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 11.9 kilometers (7.4 miles) west of the community.⁴ The site restriction will prevent a short spacing to Station WRLO-FM, Channel 287C1, Antigo, Wisconsin, and Station WAPL-FM, Channel 289C, Appleton, Wisconsin. We find that the issues raised by Heller concerning unbuilt stations in which Evans is the permittee or consulting engineer are beyond the scope of this rule making proceeding. Heller's allegations of wrongdoing against Evans are more appropriately raised outside of the rule making process.⁵ Moreover, since the allotment of Channel 288A at Nekoosa will establish a thirty-day filing window, there is no guarantee that Evans will be the ultimate permittee at Nekoosa.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective February 10, 1997, the

³ In Abuses of the Commission's Processes, 5 FCC Rcd 3911, 3914 (1990), recon. denied, 6 FCC Rcd 3380 (1991), the Commission held: A statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1105 of the Rules and would be subject to prosecution pursuant to Section 502 of the [Communications] Act [of 1934, as amended], forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions.

⁴ The coordinates for Channel 288A at Nekoosa are 44-18-33 and 90-03-10.

⁵ Heller indicates that on November 6, 1995, as President of WTRW, Incorporated, he requested that the Commission cancel the construction permit of Station WCAE-AM (BP-850122AG as modified by BMP-941121DA) in Nekoosa, Wisconsin. The construction permit for Station WCAE-AM was cancelled and the call sign deleted effective August 26, 1996.

FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

<u>Community</u>	<u>Channel No.</u>
Nekoosa, Wisconsin	230C3, 288A

7. The window period for filing applications for Channel 288A at Nekoosa, Wisconsin, will open on February 10, 1997, and close on March 13, 1997.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 288A at Nekoosa, Wisconsin, should be addressed to the Audio Services Division, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau